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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO POINT III OF RESPONDENTS' BRIEF

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THE COURT PRESS, INC.

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In answer to the argument in Point III of respondents' brief that the claims on the specific indemnity covenants contained in the leases in these

cases are not provable, we call attention to the following:

(1) The agreement of the tenant to indemnify his landlord is itself an existing contractual obligation susceptible of present valuation: An agreement of indemnity is the proper basis of a provable claim in bankruptcy. (*Williams* v. *United States Fidelity and Guaranty Company*, 236 U. S. 549; *In re Buzzini*, 183 Fed. 827, cited with approval by this Court in *Maynard* v. *Elliott*, 283 U. S. 273).

The provability of the indemnity covenant in bankruptcy may be based theoretically on the doctrine of anticipatory breach (cf. *Equitable Trust Company* v. *Western Pacific Railway Company*, 244 Fed. 485, aff'd 250 Fed. 327, cer. den. 246 U. S. 672; *In re Mullings Clothing Co.*, 238 Fed. 58, cer. den. 243 U. S. 635; *Central Trust Company* v. *Chicago Auditorium Ass'n*, 240 U. S. 581; *Re Fitz George* [1905] 1 K. B. 462); or on the broad ground that any contractual obligation susceptible of present liquidation, matured or unmatured, absolute or conditional, may be proved in bankruptcy. *Maynard* v. *Elliott; Restatement, Contracts*, Section 324. In *Equitable Trust Company* v. *Western Pacific Railway Company, supra*, present damages of over $38,000,000 were assessed in an action brought upon a contract to indemnify *seriatim* in future years. The district court's decision was substantially based upon the assumption that the demand would be provable in bankruptcy. L. Hand, *D. J.*, said, 244 Fed. 504:

> "This is obviously the result when the indemnitor becomes insolvent, and it would be a strange rule which favored a frank repudiator over an obligor overtaken by bankruptcy."

The opinion of the Circuit Court of Appeals, Hough, *C. J.*, cited two bankruptcy cases as authorities for the result, the *Chicago Auditorium* case and *Re Fitz George, supra.*

(2) It is not an objection to proof in bankruptcy that the agreement of indemnity by its terms provides for the payment of an amount or amounts not liquidated at the date of the petition. The function of the bankruptcy court is not to award *specific performance,* but to fix *present value.* The determination of the present value of such an indemnity covenant presents no difficulty—the accepted measure is the discounted difference between rental value and rent reserved. *Reading Iron Works—Sweatman's Appeal,* 150 Pa. St. 369, cited with approval by this court in *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597 (Petitioner's Main Brief, p. 15).

In Judge Learned Hand's opinion in *Equitable Trust Company* v. *Western Pacific Railway Company,* it was said (244 Fed. 504):

> "It is quite true that the creditor gets his discounted future installments now in hand, which is something other than getting the full value later, but that is a necessary concession to some present disposition of the controversy, as near a remedial approximation as the circumstances permit. It is true also that the indemnitor's obligation is changed from a series in the future to a gross sum down * * *. Damages sound in remedy and are by no means the equivalent of performance. Were it so, specific performance would be the only possible remedy, and even that not literally such."

(3) It should be noted that the respondents' characterization of the facts in *Williams* v. *United States*

Fidelity and Guaranty Company, supra, is not complete. They say that "every event necessary to determine both the fact of liability of the surety and its amount, had taken place prior to bankruptcy" (Respondents' Brief, p. 61). If this statement is meant to imply that the surety's claim for indemnity was fully liquidated at the date of bankruptcy it is not borne out by the record filed in this Court. While it is true that prior to the date of bankruptcy (Transcript, p. 23), the building work had been taken over by the obligees and completed and the excess cost had been determined, nevertheless, the amount which the surety actually had to pay and for which, therefore, it was entitled to indemnity had not yet been fixed. As it actually turned out, the surety did not have to pay the total excess cost which was proved by the obligees in the bankruptcy in the sum of $6,876.08 (Transcript, p. 23). The surety, which was not sued until after the bankruptcy, *settled* the judgment which was obtained against it by the obligees and had only to pay $5,475.36 (*ibid.*, p. 11) in satisfaction of that judgment. It also paid $896 to its attorneys for services in *defending and settling* the suit (*ibid.*, p. 22). Obviously neither of these amounts could have been predicated with certainty at the date of bankruptcy. As was said by the Court of Appeals of Georgia in that case:

> "* * * At the time the petition in bankruptcy was filed the surety had not sustained or incurred any loss or damage on account of the contractors' default * * *. No judgment fixing the amount of the contractors' liability had been obtained. The only information that the surety could have had on the subject was the claim made by the trustees of the school; and it could not know but that the contractors

might have a good defense to the claim, or some part of it; * * *."

Williams & Co. v. *United States Fidelity and Guaranty Company*, 11 Ga. App. 635, 644 (1912).

Respectfully submitted,

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